DATE:FEBRUARY 12, 1996

CASE NO: 94-INA-503

In the matter of

PARTICLE DATA LABORATORIES, LTD.
Employer

on behalf of

SOHRAB SADAT-GOUSHEH
Alien

Before: Jarvis, Vittone, and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Particle Data Laboratories, Ltd's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: 1) there are not sufficient workers in the United States who are able, willing, qualified and available; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public

employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On June 5, 1992, Employer filed a Form ETA 750, Application for Alien Employment Certification, with the Illinois Department of Employment Security ("IDES") on behalf of the Alien, Sohrab Sadat-Gousheh. (AF 3) The job opportunity was listed as Assistant Director of Laboratories. Id. IDES assigned it the occupation title of Laboratory Supervisor with the occupational code of 022.137-010. Id. As filed, the application required 4-6 years of college education with a Bachelor of Science or Master of Science in Biology or Material Science. It was subsequently amended to delete the Master of Science requirement and require only 4 years of college. Id. The application required two years experience in the job offered or in high-tech analysis laboratory performance. Id. The job duties were described as:

> Perform required record keeping for incoming samples of particulate materials to be analyzed and determine correct procedures to be used for sample preparation and analysis by any of several sophisticated techniques, and prepare analysis results in appropriate format, for: Particle Size Analysis (ELZONE method, BAHCO micro-classifier, HORIBA centrifugal sedimentation, dry or wet SIEVE analysis); Porosimetry (MICROMERITICS mercury-intrusion porosimeter): Surface Area (MICRO-MERITICS AND QUANTACHROME gas-absorption dynamic BET analyzers). Perform and supervise these measurements, interface with clients, and design any special software needed for particular requirements. Also perform or supervise any ancillary microscopy as needed (phase contrast or polarized light). Id.

The application required "High adaptability and flexibility as to high-tech measurement techniques including full application of laboratory computer technology" as special requirements. Id.

IDES forwarded the file to the CO prior to recruitment because of a dispute with Employer over the proper publication in which the job should be advertised and other matters contained in the application. (AF 56-57). On June 1, 1993, the CO issued a first Notice of Findings ("NOF") which required Employer to advertise the position in Chemical and Engineering News and make modifications in the Form ETA 750. (AF 53-55) Employer filed a rebuttal to the first NOF. (AF 49-50) On July 27, 1993, the CO

issued a second NOF which required Employer to adhere to the directions contained in the first NOF. (AF 46-48) Thereafter, Employer agreed to comply with the findings of the first and second NOFs. (AF 39)

After the job was advertised, IDES referred thirteen applicants to Employer. None was hired; although one applicant, whom Employer considered to be overqualified, was hired for a higher paying job. (AF 24-26) On March 15, 1994, the CO issued a third NOF which required rebuttal on two issues: (1) Whether the job requirements were the actual minimum ones. Employer was required to submit documentation showing that the Alien possessed the required two years of experience prior to being hired by Employer or that it was not feasible to hire a worker with less training; (2) Whether the applicant whom Employer considered to be overqualified was actually hired at a higher paying job. (AF 20-22)

Employer submitted rebuttal which stated that: (1) It was not feasible to hire a worker without the stated capabilities; (2) The overqualified applicant was hired for a higher paying job and was working for Employer; (3) Although the Alien had not been employed at a wage paying job prior to working for Employer, he gained the requisite job experience during the four years of college when he obtained his M.S. degree. (AF 17-18) The CO issued a Final Determination ("FD") on May 11, 1994, which superseded one issued on April 29, 1994. (AF 11-16) The FD denied certification. The CO found that Employer successfully rebutted that the overqualified applicant had been hired at a higher paying position. (AF 12) That issue need no longer be considered. However, the CO also found that Employer failed to rebut that the Alien did not have the required two years of experience at the time he was hired or that it was not feasible to hire U.S. workers with less experience than required in the job offer. Id. Employer filed a request for review. (AF 1-10)

Discussion

The record clearly indicates that the Alien was trained by Employer while in the job. The Alien so admits:

> I started my employment at Particle Data Labs in March of 91 with a Master of Science degree. I was trained to operate the mentioned equipment and perform the mentioned tasks for over three years. (AF 50)

Thus, the Alien did not have two years experience in the job at the time he was hired. However, Employer argues that the Alien had two years experience in the alternate requirement for the job. Employer submitted a letter from Professor William T. Barnes, a professor of biochemistry at Northern Illinois

University which stated in part that:

> Mr. Sohrab Sadat-Gousheh studied for eight years at Northeastern Illinois University, 1982 thru 1989.
>
> His first four years resulted in a Bachelor of Science (Biology) degree. The next four years Mr. Gousheh devoted to expanding his technical knowledge, including state-of-the-art, high-tech, laboratory instrumentation, earning his Master of Science degree (Biology) in the process. (AF 36)

The CO correctly found that this evidence was not sufficient to establish that the Alien met the requisite alternate minimum experience requirement at the time he was hired for the job.

Finally, Employer contends that even if the Alien did not have the minimum experience requirements, it is not feasible to hire workers with less training or experience than that required in the job offer.

Section 656.21(b)(5) provides that:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

It has been held that labor certification will be denied under this section [1] when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position. To invoke the "not feasible" exception, the employer is required to document that it is not now feasible to hire workers with less training or experience than that required by the employer's job offer. MMMATS, Inc., 87-INA-540 (November 24, 1987)(en banc).

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[1] The section was previously numbered 656.21(b)(6).

In the case at bench, the only documentation submitted by Employer on the issue of nonfeasibility was the Employer's statement which said:

> I hereby certify it was not feasible for Particle Data Labs in this case to hire a worker without the stated capabilities and experience, because we cannot afford the time or expense for a series of college courses in lab analyses and/or for training to overcome a speech accent or poor grammar/spelling, either of which pose excessive difficulty in communicating with our customers, vendors, etc. (AF 17)

A bare statement of infeasibility is not sufficient to establish that an employer cannot now hire workers with less experience and provide training. MMMATS, Inc., supra; Franco's Quality Printing Corp., 93-INA-555 (July 14, 1994); Coastal Printworks, Inc., 90-INA-289 (Oct. 29, 1991). The CO did not err when she found that Employer had failed to establish that it was not feasible to hire and train U.S. workers for the job.

Since the Alien did not possess the minimum requirements for the job at the time he was hired and the Employer failed to establish that it was not feasible to hire and train U.S. workers for the job, the FD should be affirmed.

ORDER

The Certifying Officer's denial of labor certification is affirmed.

FOR THE PANEL:

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DONALD B. JARVIS
Administrative Law Judge